UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES HEALEY on behalf of SARAH HEALEY (deceased), Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C10-5679-RAJ REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff, on behalf of deceased claimant Sarah Healey, proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Ms. Healey's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Claimant was born on XXXX, 1982.[1] She had a high school education and previously worked as an assembler and fast food worker. (AR 21-22.)

Claimant filed an application for DIB, and protectively for SSI, on June 19, 2007, alleging disability beginning September 16, 2006. She is insured for DIB through December 31, 2011. (AR 12.) Claimant's application was denied at the initial level and on reconsideration. Claimant timely requested a hearing. On October 24, 2000, ALJ Ruperta M. Alexis held a hearing, taking testimony from claimant, a medical expert, a vocational expert, and claimant's mother. (AR 29-84.) On December 4, 2009, the ALJ issued a decision finding claimant not disabled. (AR 12-23.)

Claimant timely appealed. The Appeals Council denied claimant's request for review on July 26, 2010. (AR 456-60), making the ALJ's decision the final decision of the Commissioner. Claimant appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found claimant had not engaged in substantial gainful activity since the alleged onset date. At step two, it must be

1 Unless otherwise specified, "plaintiff" will refer to Charles Healey, and "claimant" will refer to decedent Sarah Healey. Claimant's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

determined whether a claimant suffers from a severe impairment. The ALJ found claimant's disorder of the back, migraines, major depressive disorder, anxiety disorder, cognitive disorder NOS, and somatoform disorder severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that claimant's impairments did not meet or equal the criteria of a listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found claimant able to perform sedentary work, that is, to occasionally and frequently lift ten pounds, sit for six hours in an eight hour work day with an ability to stand, to get up, move around, and sit again; to stand or walk for two hours in an eight hour work day with the ability to change positions. Claimant was found to have no manipulative limitations or restrictions, to have nonexertional limitations or restrictions limited to the performance of very simple and repetitive tasks, to have the ability to take breaks in the performance of those simple repetitive tasks, to be unable to sustain concentration for more than two hours at a time without having to change positions, to be unable to perform detailed or complex tasks, and to have very limited interaction with supervisors, co-workers, or members of the public. With that assessment, the ALJ found claimant unable to perform her past relevant work.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the regional or national economy. With the assistance of a vocational expert, the ALJ found claimant capable of performing other jobs, such as work as a bench hand, circuit board touch-up screener, and table worker.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in failing to obtain regional job-incidence data at step five, and in finding 23,000 national jobs to be a "significant number." He assigns error to the ALJ's RFC finding and to the consideration of the testimony of the vocational expert, as well as the evaluation of lay witness testimony. He requests remand for an award of benefits or, alternatively, for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and free of legal error, and should be affirmed.

Step Five Finding

A. Dictionary of Occupational Titles (DOT)

The ALJ found claimant unable to perform her past relevant work as an assembler and fast food worker, because of limitations in her RFC. (AR 21-22.) Therefore, the ALJ proceeded to step five of the sequential evaluation process, and utilized a vocational expert (VE) to identify jobs that claimant could perform. The VE identified three jobs, that of bench hand, circuit board touch-up screener, and table worker. (AR 22.) Plaintiff argues that two of the three jobs are inconsistent with the ALJ's RFC finding. Specifically, the DOT describes

the positions of bench hand and circuit board touch-up screener as having a reasoning level of two, defined as being able to "carry out detailed but uninvolved written or oral instructions." DOT, Appx. C (available at http://www.occupationalinfo.org/appendxc_1.html#III) (emphasis supplied).

Plaintiff notes that the ALJ found claimant unable to "perform detailed or complex tasks[.]" (AR 18.) Therefore, plaintiff posits, only one of two possible conclusions may be reached. If the VE was referring to positions of bench hand and circuit board touch-up screener that differed from the DOT description of the reasoning capacity of those positions, the ALJ erred in failing to elicit a reasonable explanation from the VE as to the discrepancy, and failed to make a finding as to the reasonableness of the explanation. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007) (An ALJ has an affirmative responsibility to inquire as to whether a VE's testimony is consistent with the DOT and, if there is a conflict, determine whether the VE's explanation for such a conflict is reasonable.) In the alternative, plaintiff argues, if the reasoning capacities of the two positions were accurately described in the DOT as level two, the positions exceeded claimant's RFC, which did not include the ability to perform "detailed" tasks. This would leave only one position identified by the VE as appropriate to claimant's RFC, the position of table worker, which has a reasoning level of one.

In response, the Commissioner argues that the ALJ's RFC finding limiting claimant to "very simple and repetitive tasks" was not inconsistent with a reasoning level of two. *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 984 (C.D. Cal. 2005) (finding "simple work" compatible with a GED Reasoning level of 2). However, unlike the cases cited by the Commissioner, *id*.; *see also Terry v. Astrue*, 580 F.3d 471, 478 (9th Cir. 2009); *Renfrow v. Astrue*, 496 F.3d 918, 921

(9th Cir. 2007), the ALJ in the instant case very specifically found claimant unable to perform "detailed" tasks, as well as restricting her to "simple and repetitive" tasks. (AR 18.) A reasoning level of one is on the "lowest rung on the development scale" and requires "only the slightest bit of rote reasoning being required." *Meissl*, 403 F. Supp. 2d at 984. The Court acknowledges the persuasiveness of the Commissioner's argument that the record could support a finding that claimant was capable of a reasoning level greater than level one. However, it is the role of the ALJ to determine credibility and resolve ambiguities and conflicts in the evidence. The ALJ's judgment should be upheld even if the evidence can equally support another outcome. *Thomas*, 278 F.3d at 954. The Court finds the requirements of the positions of bench hand and circuit board touch-up screener inconsistent with the claimant's RFC as assessed by the ALJ.

Only the position of table worker has the requisite reasoning level consistent with claimant's assessed abilities. If existing in sufficient numbers, this job could form the basis for a legally sufficient step five finding of non-disability. *See, e.g., Tommasetti v. Astrue*, 533 F.3d 1036, 1043 (9th Cir. 2008) (upholding the sufficiency of one occupation as substantial evidence support for the ALJ's finding that claimant was not disabled). Plaintiff, however, poses additional challenges to the ALJ's step five finding.

B. Regional Data and Number of Available Jobs

If a social security claimant is found unable to do any past relevant work or does not have any past relevant work, the ALJ must determine whether the claimant can make an adjustment to other work. 20 C.F.R. §§ 404.1520(g), 416.920(g). At this step of the sequential evaluation process, the testimony of a VE may be utilized to meet the

Commissioner's burden of establishing the claimant's ability to perform other work. *Thomas,* 278 F.3d at 955. *See also Martinez v. Heckler,* 807 F.2d 771, 775 (9th Cir. 1986) ("This circuit has consistently held . . . that the definition of disability is based upon the existence of jobs in significant numbers in the national economy.") (citing *Sorenson v. Weinberger,* 514 F.2d 1112, 118-19 (9th Cir. 1975)). Here, in finding claimant not disabled at step five of the sequential evaluation, the ALJ relied on the VE's identification of 23,000 national jobs consistent with claimant's RFC. The VE did not provide regional job incidence data. (AR 79-80.) Plaintiff argues that the ALJ erred in failing to also obtain regional data as to available jobs. Plaintiff also argues that 23,000 jobs do not constitute a "significant number" such that the Commissioner's step five burden would be satisfied.

The Commissioner agrees that the regulations require citation to regional data at step five, but argues that the number of national jobs identified renders harmless the ALJ's failure to obtain this data. (Dkt 24 at 7.) The Commissioner contends that the identification of 23,000 jobs by the VE, existing in the national economy, is a significant number, citing the Social Security Act's provision that a claimant will be found not disabled if he is capable of "performing his past relevant work or any other work in the national economy." 42 U.S.C. § 423(d)(2)(A) (emphasis added). With this Court's finding that the record does not support the appropriateness of two of the three proffered jobs, the substantial evidence support for the ALJ's step five finding is dependent on the sufficiency of the number of table worker jobs.

The VE testified at hearing that 5,000 table worker jobs exist in the national economy. (AR 80.) The VE did not provide regional job incidence data. Assuming, as the Commissioner argues, the "significant number" requirement could be satisfied by the

identification of a sufficient number of positions available in the national economy, this Court is not persuaded that 5,000 jobs available nationally is adequate. Although this Circuit "has never clearly established the minimum number of jobs necessary to constitute a 'significant number[,]'" *Barker v. Sec'y of Health and Human Services*, 882 F.2d 1474, 1478 (9th Cir. 1989), this Court is not aware of any decision in this Circuit finding 5,000 national jobs to be a "significant number[.]" *Cf. Martinez v. Heckler*, 807 F.2d 771, 774 (9th Cir. 1986) (finding less than 5,000 jobs available in the local metropolitan area to constitute a "significant number").

Whether there are a significant number of jobs a claimant is able to perform with her limitations is a question of fact to be determined by a judicial officer. *Martinez*, 807 F.2d at 774. Therefore, the Court finds it necessary to remand this matter for further findings on this issue.

RFC Assessment

In assessing claimant's RFC, the ALJ found her able to "sit for 6 hours in an 8 hour work day with an ability to stand, to get up, move around, and sit again; can stand or walk for 2 hours in an 8 hour work day with the ability to change positions[.]" (AR 18, emphasis added.) Plaintiff argues this RFC was legally insufficient in that the ALJ failed to determine how long claimant could sit without interruption. In the alternative, plaintiff argues that, assuming the ALJ's RFC finding is interpreted as requiring an at-will sit/stand option, the RFC was not consistent with the VE's testimony that the proffered jobs would require sitting for "probably a half hour at a time, maybe a little longer[,]" and could not be performed while standing. (AR 81-82.) Therefore, plaintiff argues, substantial evidence does not support the ALJ's step five

finding, and claimant should be considered disabled as a matter of law.

Responding, the Commissioner disputes plaintiff's contention that the ALJ failed to determine how long claimant could sit without interruption. The ALJ cites the ALJ's finding that claimant was "unable to sustain concentration for more than 2 hours at a time without having to change positions[,]" providing a time frame of two hours for claimant's ability to sit before changing position. (AR 18.) The Commissioner notes the compatibility of this finding with the VE's testimony that the proffered jobs require a worker to maintain a seated position for "a half hour at a time, maybe a little longer." (AR 81.) In response to plaintiff's argument that the prelusion of an ability to perform these particular jobs while standing was inconsistent with the claimant's RFC, the Commissioner argues that the plaintiff has misinterpreted the RFC. While the ALJ provided that claimant should have the ability to "stand, get up, move around, and sit again[,]" the ALJ did not indicate that claimant should have the ability to actually perform the work while standing.

The Court agrees with the Commissioner that the ALJ did not require claimant to stand for two hours per work day, but rather found that she "can stand or walk for 2 hours in an 8 hour work day with the ability to change positions." (AR 18.) The ALJ's assessment of claimant's ability to sit for six hours in an eight hour day if she is given the ability to "stand, to get up, move around, and sit again" does not equate to requiring claimant to be given the option to perform the work sitting or standing at will. The only limitation the ALJ found on the length of time claimant was able to sit without changing positions was claimant's ability to sustain concentration. In that regard, the ALJ found her able to sit for no more than two hours. The Court does not find error in the ALJ's assessment of claimant's RFC.

Evaluation of Lay Witness Evidence

Plaintiff assigns error to the ALJ's evaluation of the lay witness statement of claimant's mother. Plaintiff notes the ALJ rejected the statement because claimant's mother was not a medical professional and because her mother may have been biased, reasons that the plaintiff contends are not legally viable. The Commissioner argues that the ALJ gave legally sufficient consideration to the mother's testimony "insofar as it is consistent with the claimant's report of suffering from depression since her accident[.]" (AR 21.) Further, the Commissioner argues, any error in this regard was harmless, as plaintiff has failed to demonstrate that a different consideration of the testimony would have impacted the ALJ's ultimate decision.

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996) (finding rejection of testimony of family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so.") "[W]here the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no

reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

This Court agrees with plaintiff that the ALJ failed to give germane reasons for discrediting the statement of claimant's mother because "she is not medically trained and cannot be considered a disinterested third party witness whose testimony would not tend to be colored by affection for the claimant." (AR 21.) These broad reasons for rejection, consisting of characteristics common to most family members, are not germane to this individual witness as required. On remand, the ALJ should reconsider this lay witness statement and provide legally sufficient reasons for the weight assigned to it.

CONCLUSION

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings.

DATED this 24th day of May, 2011.

Mary Alice Theiler
United States Magistrate Judge